SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

JOE LASH,

Petitioner,

vs.

STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Court of Appeals of Alabama is reported in 14 Southern (2d) 229 (R. 70), certiorari denied by the Alabama Supreme Court, June 10, 1943, application for rehearing denied by the Alabama Supreme Court, June 30, 1943. The opinion of the Supreme Court of Alabama, on which the decision of the Court of Appeals was predicated, is reported in 14 Southern (2d) 235 (R. 76).

Jurisdiction.

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Statement of the Case.

The statement of the case appears in the petition and is incorporated herein by reference. Such statement contains all of the facts necessary for argument.

Specification of Errors.

The Court of Appeals of Alabama and the Supreme Court of the State erred in the following respects:

1. In holding that Section 3447 of the Code of 1923 of Alabama (Title 14, Section 54 of the Code of 1940) was not void on its face or as applied in the instant case as depriving petitioner of freedom of speech and assembly.

2. That petitioner was not deprived of liberty without due process because convicted on charges not made.

3. That petitioner was not deprived of liberty without due process in being convicted under a statute so vague and indefinite as not to apprize him of its meaning.

ARGUMENT.

I.

The statute on its face or as applied in the instant case deprives plaintiff of freedom of speech and assembly.

This case involves a union member who, while peacefully engaged with other union members in picketing certain premises in Florence, Alabama, where a building contractor was constructing houses with non-union labor,—a legitimate labor dispute under *American Federation of Labor* v. *Swing, supra*—was arrested under a statute making it a crime to combine or conspire, without just cause or legal excuse, for the purpose of interfering with the lawful business of another. The charges or complaint against the

picket were framed in the same general language of the statute and the picket was sentenced to imprisonment upon a general finding of guilty. Although there was some testimony of violence by the pickets, not, however, including or specifying the picket, Joe Lash, this testimony, even if true, is immaterial here for the reasons:

1. The picket, Joe Lash, was not charged with violence or with participating in violence, or combining or conspiring to commit violence or to hinder a lawful business by the use of violence.

2. The statute under which the picket was convicted did not deal with violence or specify that a combination or conspiracy to hinder a lawful business by the use of violence was a crime.

3. Such evidence as was introduced concerning violence did not show or attempt to show that the picket, Lash, had participated therein or agreed thereto, or even knew thereof.

The obvious complaint against the petitioner, and the complaint under which he was convicted, was that by the act of combining with others to picket the premises of a non-union contractor, for the purpose of thereby hindering or interfering with the business of such contractor, petitioner was guilty of a crime. If petitioner was being arrested, convicted or sentenced for participating in or conspiring to commit violence, surely the statute and the accusation thereunder would have so specified, and surely if it was participation in violence or the use of force with which the complainant Hansel or the State was concerned, Title 14, Section 54 of the Alabama Code of 1940 which makes it a crime

> "To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property

> belonging to or used by another, or with the use or employment thereof."—

would have been utilized, not to mention the various statutes dealing with assaults.

The Supreme Court of the State, in considering the statute, decided in substance as follows:

1. That the phrase "without just cause or legal excuse for so doing", as employed in the statute and affidavit, "means unlawful".

2. That as so construed, the statute constituted a proper exercise of the power of the state to protect "a person's business * * * from unlawful interference".

The opinion of the State Supreme Court made no reference to any acts of violence committed by any of the pickets or the defendants or to the character of the picketing. The State Supreme Court, however, adverted to the *Meadowmoor* case in the following language:

> "The opinion of the majority, in the *Drivers Union* case, *supra*, clearly indicates that the *Thornhill* case, *supra*, has no application to the *unlawful acts of the defendant declared and charged in the indictment under the statute* duly directed to an unlawful conspiracy, combination or agency to hinder or interfere unlawfully with the carrying on of any lawful business. (Emphasis supplied.)

Thus, it is seen that the court, in referring to "unlawful" acts of defendant, referred only to those acts set forth in the indictment, which is the affidavit in the present case, and which makes no mention of force or violence.

Accordingly, it is obvious that even under the interpretation given by the Supreme Court the statute

> "leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity,

> the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." (*Thornhill* v. *Alabama*, 310 U. S. 88.)

The *Thornhill* case is determinative of the issues in this case. The statute under which petitioner was convicted in the present case is a companion to the statute declared unconstitutional on its face in the *Thornhill* case. The statute in the *Thornhill* case forbade the doing of certain acts; the statute in the present case forbids a conspiracy to do the same acts. The acts which are forbidden are in both cases identical. A comparison of the two statutes reveals their similarity. The statute struck down in the *Thornhill* case stated as follows:

> "Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The statute in the present case states as follows:

> "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying, or preventing

> any other persons, firms, corporation, or association of persons from carrying on any lawful business, shall be guilty of a misdemeanor."

Thus, the essence of both statutes is seen to be interfering, "without a just cause or legal excuse for so doing", with the carrying on of a lawful business. The gist of the crime under Section 3448 in *Thornhill's* case was the actual hindrance, and the statute was there struck down because of the "pervasive threat inherent in its very existence", the penal statute not being aimed "specifically at evils within the allowable area of State control * * * resulting in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview". The gist of the crime under Section 3447 in the present case is a conspiracy so to hinder, and the statute, being of purport and phraseology similar to Section 3448, should for like considerations be struck down.

As in the *Thornhill* case, petitioner here was charged under a complaint or affidavit which was phrased substantially in the very words of the statute, the affidavit under which he was arrested and convicted stating as follows:

> "* * * did, without just cause or legal excuse for so doing, enter into a combination conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying, or preventing, C. P. Hansel from carrying on a lawful business, to-wit, the business of building houses, * * *."

As in the *Thornhill* case, the finding against petitioner was a general one and did not specify the testimony upon which it rested. As in the *Thornhill* case, none of the courts below expressed an intention of narrowing the construction of the statute. Accordingly, as stated in the *Thornhill* case, the statute in question must be judged upon

its face. This is true because the regulation in question here infringes upon the right of employees to inform the public of the facts of a labor dispute. In such cases, where liberty to speak is involved, it is not permitted the state to establish a pervasive threat to the exercise thereof by a statute which does not aim specifically at evils with which the state is free to cope, but which, as stated in the *Thornhill* case,

> "on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider v. State*, 308 U. S. 147, 155, 162-163."

While the evidence in the case may have disclosed several acts of violence, we are here concerned not with that evidence, but with the statute and charge thereunder, neither of which make any reference to violence or specify any other unlawful activities which might arise in the cause of picketing and with which the state would be free to deal. As stated by the Supreme Court in the *Thornhill* case,

> "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing

> the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

Further, as stated in the *Thornhill* case,

> "We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries v. Tri-City Council*, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

Petitioner does not contest the right of the state to make any and all laws restricting or forbidding the use of violence in labor disputes, whether or not such violence was committed for the purpose of interfering with the operation of a lawful business. Neither does petitioner deny the right of the State to prevent conspiracies to commit such violence. However, petitioner does contest the right of the State to restrict or prohibit the use of violence in labor disputes by statutes such as the present one not aimed specifically at the evil with which the State is free to cope, and which includes within it all incidence of picketing in a labor dispute, regardless of whether violence or conspiracy to commit violence is or is not involved. Where the exercise of civil liberties is concerned, the State is not accorded its usual freedom in dealing with unlawful conduct.

> "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations, which are aimed at or in their opera-

tion diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." (*Thornhill* v. *State of Alabama*, 310 U. S. 88.)

Broad, all-inclusive language, or language of no definite content or meaning, such as "without just cause or legal excuse", which does not serve to separate the lawful from the unlawful, or to point out the permissible from that which can be constitutionally proscribed, cannot be employed, for to do so would on its face invalidate the peaceful exercise of civil rights. The term "without just cause or legal excuse", as used in a companion statute, have authoritatively been stated by the United States Supreme Court to in no "effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical" (*Thornhill* case, *supra*); a substitution by the Supreme Court of Alabama of the equally indefinite and ambiguous term "unlawful" certainly in no more effective manner restricts the breadth of the regulation. Obviously, any peaceful act of picketing by two or more pickets engaged in a legitimate labor dispute which has the effect, as it very well might have, of hindering the carrying on of a lawful business would come under the terms of the statute, and persons engaging therein could be indicted thereunder as conspirators. As stated in the *Thornhill* case:

> "It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. * * * The courses of action, listed under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of

> the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute."

Since *Thornhill's* case it cannot be argued that danger of injury to an industrial concern or a hindrance to its operation is sufficient to justify what amounts to a sweeping proscription of all means of informing the public of the existence and nature of a labor dispute:

> "The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

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> "The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448." (*Thornhill* v. *Alabama*, 310 U. S. 88.)

The present prosecution involves an attempt to revive, through the means of an old and little used statute, the loose and easily misused doctrine of conspiracy that in the past has so often been utilized to suppress and stifle attempts of workers to better their conditions through combination.[2] Surely, where rights fundamental to a democracy are concerned, this Court will intervene, as it did in *Thornhill's* case, to protect combinations of working people to disseminate information concerning the facts of a labor dispute from the previous general restraint that is inherent in a statute such as Section 3447.

II.

If the element of violence be deemed material, petitioner was nevertheless denied due process of law in violation of the Fourteenth Amendment by conviction on a charge not made.

It might be argued, although assuredly as an afterthought, and although in disregard of the facts as disclosed in the record, that there was evidence introduced at the trial of violence operating to hinder Hansel's business; that pickets in general engaged in such violence; that petitioner Lash was one of such pickets; and that therefore it can be assumed or inferred that there was a combination or conspiracy to commit violence or to hinder Hansel's business

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[2] See Frankfurter and Green, "The Labor Injunction", pp. 2-5, and Witte, "The Government in Labor Disputes", pp. 46, 55.

by the use of violence, to which Lash, as a picket, was a party. A short answer to such an argument is that petitioner Lash was not charged with engaging in violence, or with conspiracy to commit violence, or with conspiracy to interfere with Hansel's business by the use of violence. The charge under which (although objected to as being insufficient) he was prosecuted and convicted alleged merely that he, without just cause or legal excuse, entered into a combination or conspiracy for the purpose of hindering C. P. Hansel from carrying on a lawful business. Further, the finding against petitioner was a general one and did not specify the testimony upon which it was predicated. Accordingly, if petitioner is to be convicted upon the theory that he had engaged in a conspiracy to commit violence, or to hinder Hansel's business by the use of violence, of which charge he was not apprized or given an opportunity to defend, he would have been deprived of due process of law in violation of the Fourteenth Amendment. The following statement from *Thornhill's* case, *supra*, is conclusive on this question:

> "The finding against petitioner was a geenral one. It did not specify the testimony upon which it rested. The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions. In these circumstances, there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. '*Conviction upon a charge not made would be a sheer denial of due process.*' *De Jonge v. Oregon*, 299 U. S. 353, 362; *Stromberg v. California*, 283 U. S. 359, 367-368." (Emphasis supplied.)

III.

Petitioner was denied due process of law in being convicted under a statute so vague and indefinite as not sufficiently to inform him of any crime.

The statute under which petitioner Lash was charged, tried and convicted simply as follows:

> "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying, or preventing any other persons, firms, corporation, or association of persons from carrying on any lawful business, shall be guilty of a misdemeanor."

Before, during, after the trial, and upon appeal petitioner objected to the charges against him and prosecution thereunder as being predicated upon a statute which was not sufficiently explicit as to inform him of any conduct on his part which might be unlawful. All objections to the sufficiency of the statute were overruled at all stages of the proceedings below. To this day petitioner has not been informed and does not know what conduct that he may have engaged in in connection with the labor dispute with the building contractor might be considered unlawful under the statute. Apparently, for the act of engaging in peaceful picketing in a legitimate labor controversy he was convicted and sentenced to 137 days in prison.

It is elemental that no one may be required, at the peril of life, liberty or property, to speculate as to the meaning of a penal statute. *Thornhill* v. *Alabama, supra; Lanzetta* v. *New Jersey, supra; United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 Law Ed. 516.

As stated in the *Lanzetta* case, *supra,*

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are

subject to it what conduct on their part will render them liable to its penalties."

It is obvious that a statute that makes it a crime to combine for the purpose of hindering the carrying on of a lawful business embraces within it countless activities which not only are lawful but which may constitute the exercise of civil rights. See *Thornhill* v. *Alabama, supra.* A statute of greater generality than the present one would be difficult to imagine. The qualification, "without a just cause or legal excuse for so doing", has been authoritatively stated by this Court to in no "effective manner restrict the breadth of the regulation; the words themselves have ~~an~~ no ascertainable meaning either inherent or historical". *Thornhill* v. *Alabama, supra.* The construction of the clause by the Alabama Supreme Court as constituting an equivalent of "unlawful" in no greater measure serves to delimit or specify the acts which persons are forbidden to engage in. The scope of the statute is completely unforseeable, and application thereof is left entirely with the court and the jury. Where, as here, the exercise of civil rights are concerned, the doctrine that a statute "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," (*Lanzetta* v. *New Jersey, supra*) must be strictly applied. It is, of course, the statute and not the accusation or evidence under it that "prescribes the rule to govern conduct and warns against transgression." *Lanzetta* v. *New Jersey, supra; Thornhill* v. *Alabama, supra.*

It is respectfully submitted that petitioner's conviction and sentence under Section 3447 deprives petitioner of due process of law in that such conviction was obtained under a statute so vague and indefinite and of such a general application as not sufficiently to inform him of the nature of the crime of which he was found guilty.

Conclusion.

It is respectfully submitted that, under the decisions cited and discussed in the foregoing arguments, it is clear that petitioner has been denied and deprived of rights granted and secured under the Constitution of the United States, and that the decision of the lower court should be reversed.

Respectfully submitted,

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